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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1763

J. B. GUNN, *Petitioner,*

vs.

JOHN JULIUS SESSER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
EDWARD P. O'BRIEN,
Assistant Attorney General.
W. ERIC COLLINS,
Deputy Attorney General.
JAMES D. HURWITZ,
Deputy Attorney General.
6000 State Building,
San Francisco, California 94102.
Telephone: (415) 557-2848.
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, J. B. Gunn, Warden of the California State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 28, 1976.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals, as yet unreported, is appended hereto as "Appendix A." The opinion of the United States District Court for the Northern District of California, unpublished, is appended hereto as "Appendix B."

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed January 28, 1976. Petitioner Gunn's petition for rehearing, suggestion for hearing en banc and request for modification of opinion was filed on February 11, 1976 and denied on March 16, 1976. The instant petition was filed within 90 days of this last date. The jurisdiction of this court is invoked under Title 28, United States Code section 1254(1).

QUESTION PRESENTED

Where the U. S. Supreme Court has not spoken to an issue, may an intermediate federal court create a new prophylactic rule of federal due process and, upon petition for habeas corpus, apply such rule to overturn a final state criminal conviction?

STATEMENT OF THE CASE

A. Proceedings in State Courts.

Respondent John Julius Sesser, on February 1, 1973, was charged by an information in Alameda County Superior Court with two counts of robbery. Additionally, three prior felony convictions were alleged. On February 8, 1973, respondent pled not guilty to the robbery charges and stood mute as to the prior convictions.

On April 2, 1973, respondent was re-arraigned on the allegations of the prior convictions and admitted

them. There was no evidentiary hearing regarding the prior convictions and no showing in the record that petitioner was advised of all the possible consequences of those admissions. On August 25, 1973, as a result of admitting the prior convictions and a jury verdict of guilty on the robbery charges, respondent was sentenced to state prison as an habitual 644(b), later modified to section 644(a).

As one of his issues on appeal to the state courts, respondent contended he was not advised of the possible consequences of the admission of his prior convictions. Citing *In re Yurko*, 10 Cal.3d 857 (1974), the California Court of Appeal noted that state law requires specific and express enumeration and waiver of constitutional rights on the record before an admission of prior convictions, and, where appropriate, requires advice on the record that the accused may be adjudged an habitual criminal, suffer an increased term of imprisonment or be subject to postponement of eligibility for parole. These procedures received prospective application from March 7, 1974. By opinion filed May 31, 1974, relief was denied as to respondent's 1973 admissions of prior convictions and the judgment was affirmed.

The California Supreme Court denied hearing on July 25, 1974.

B. Proceedings in the Federal Courts.

On July 23, 1974, respondent Sesser filed a Petition for Writ of Habeas Corpus in the Federal Dis-

trict Court for the Northern District of California alleging, *inter alia,* that the trial court's failure to advise him of the consequences of admitting his prior felony convictions denied him a right of federal due process. *Wright v. Craven,* 461 Fed.2d 1109 (9th Cir. 1972) had held that ". . . under California law an admission by a defendant of prior felony convictions . . . is the 'functional equivalent' of a plea of guilty to a separate charge . . . and, therefore, it may not be accepted unless the defendant understands the consequences of the admission." Relying on *Brady v. Maryland,* 373 U. S. 83, 90 (1963), the Federal District Court determined that it was bound by California's determination in *Yurko, supra* and *In re Griffin,* 39 Cal.App.3d 279, 283 (1974) that, under California law prior to March 7, 1974, the admission of a charged prior conviction was not the 'functional equivalent' of a plea of guilty to a charged substantive offense. By an order filed October 17, 1974 the Federal District Court denied the petition.

On appeal, by a *per curiam* opinion filed January 28, 1976, the U. S. Court of Appeals for the Ninth Circuit determined, state law notwithstanding, that the Federal District Court was required to follow *Wright v. Craven.* The court reversed and remanded.

Petitioner has requested and received from the United States Court of Appeals for the Ninth Circuit an "Order Staying Issuance of Mandate" pending the timely filing of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case presents a fundamental issue of federalism. Even allowing for reasonable judicial interpretation of its opinions, this Court has never declared, nor even intimated, that advice and waiver of constitutional rights on the record is required as a matter of Federal Due Process when a defendant, represented by counsel, admits a charged prior felony conviction. Only this Court has appellate jurisdiction over the highest state courts; nonetheless, the United States Court of Appeals for the Ninth Circuit employed the writ of habeas corpus to impose upon California criminal procedure its own prophylactic requirements for the receipt of such admissions. If the opinion in this case is allowed to stand, an intermediate federal court will have successsfully vested itself with a quasi-appellate rule-making power which it then has employed to overturn a state conviction reached in full compliance with all declarations of this Court.

An alternative reason for granting the writ is to resolve a split in opinion among the Circuit Courts of Appeal. The position we assert has been aptly expressed by the Seventh Circuit as follows: "Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *United States ex rel. Lawrence v. Woods,* 432 Fed.2d 1072, 1075 (1970). This position also has been adopted by many State Supreme Courts. By contrast, the Ninth Circuit felt obligated to apply its own rule, notwithstanding "California's failure to be persuaded by

Wright v. Craven." Opinion, App. A. at p. v. Thus, the Opinion of the Ninth Circuit embodies a view opposite to that of the Seventh Circuit.

We earnestly submit that the opinion in this case expands Federal habeas corpus far beyond its purpose to secure compliance with the Supremacy clause. It seriously interferes with state administration of criminal justice within state borders. Additionally, it threatens to convert by merger traditionally parallel systems of state and federal courts into a regional judicial hierarchy. We respectfully request this petition be granted so that appropriate state court-federal court relationships may be re-established.

ARGUMENT

I

WHERE THE UNITED STATES SUPREME COURT HAS NOT SPOKEN TO AN ISSUE, A LOWER OR INTERMEDIATE FEDERAL COURT MAY NOT CREATE A NEW PROPHYLACTIC RULE OF FEDERAL DUE PROCESS AND THEN, UPON PETITION FOR HABEAS CORPUS, APPLY SUCH RULE TO OVERTURN A STATE CRIMINAL CONVICTION.

For the Ninth Circuit to have applied *Wright v. Craven* to the instant case, that court must have believed either (a) that *Wright* is a necessary and unavoidable consequence of *Boykin v. Alabama*, 395 U. S. 238 (1969), binding on the states by the Fourteenth Amendment, or (b) that a Circuit Court's independent prophylactic requirements of due process, controlling in federal prosecutions within the circuit, may serve the basis of habeas corpus relief for state prisoners. It

is unclear from the opinion in this case which proposition the Ninth Circuit asserts. We take issue with both.

A. Wright v. Craven constitutes an independent and novel declaration of due process by the Ninth Circuit, influenced but not compelled by Boykin v. Alabama.

Neither *Boykin v. Alabama*, 395 U. S. 238 (1969), nor any other expression of the United States Supreme Court, speaks to the issue of whether or not a defendant in a state criminal proceeding must be advised on the record of his constitutional rights regarding self-incrimination, confrontation and jury trial when he admits a prior felony conviction. *Boykin* is limited solely to discussion of what advice must be given when a defendant in a state criminal proceeding enters a plea of guilty to a substantive offense. Such a plea is qualitatively different from any other admission a defendant can make. It is ". . . more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See *Kercheval v. United States*, 274 U. S. 220, 223." *Boykin, supra* at 242.

Wright v. Craven applied *Boykin* to the admission of a prior conviction, characterizing such admission as the "functional equivalent" of a plea of guilty. We disagree and, submit that the differences between a plea of guilty and an admission of a prior felony conviction are too great for any expansion of *Boykin* beyond the clear limits of its original context to be a matter of federal constitutional compulsion.

California procedure for receiving an admission of a prior conviction complies with the due process requirements of *Oyler v. Boles,* 368 U.S. 448 (1962). *In re Ponce,* 65 Cal.2d 341 (1966). Beyond the requirements of *Oyler,* however, it remains open whether there is a constitutionally guaranteed right to jury determination in recidivist proceedings, whether the right to confrontation is as extensive as it is in an actual trial and whether the right against self-incrimination involves anything more than the right to deny and contest the allegation of prior felony convictions. *Spencer v. Texas,* 385 U.S. 554 (1967) recognized that tolerance was particularly appropriate for a broad spectrum of recidivist procedures and specifically discussed procedures which involve determinations of prior convictions by a court or parole board rather than by a jury. *Id.* at 385 U. S. 566-567. If one or all of the federal constitutional rights regarding jury trial, self-incrimination and confrontation are not required in recidivist proceedings, a complete *Boykin* analogue is inappropriate.

Even if all three rights are required, we submit that the *Boykin* protective admonitions are not. These protections were necessary in *Boykin* because it is the nature of a guilty plea, as a virtual conviction, to foreclose further intercession of constitutional protections prior to conviction. By striking contrast, when a defendant admits a prior felony conviction, he may still assert every appropriate constitutional right with respect to proof of every element of his substantive offense. In California, the accused may admit his

prior convictions, thereby securing the tactical benefit of keeping knowledge of the prior convictions from the jury except for purposes of impeaching the accused's own testimony. California Penal Code section 1025; California Evidence Code section 778. Then, if the defendant is not convicted of his substantive offense, his admission will be of no import. Even if he is convicted of the substantive offense, the court might well exercise leniency by striking or not pronouncing judgment on the admitted priors. *In re Candelario,* 3 Cal.3d 702 (1970).

In reviewing the "general fairness" of the Texas recidivist procedures, this Court noted: "In the procedures before us, in contrast, no specific federal right —such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Spencer, supra* at 385 U.S. 565. The leap from *Boykin* to *Wright* by the Ninth Circuit hardly reflects this caution. *Boykin* has not been applied to require protective admonitions where the accused stipulates to some of the elements of his substantive offense, such as knowledge of narcotic substances in a drug case or identity and the fact of sexual intercourse in a rape case. If protective admonitions are not required for this intermediate situation, certainly *Boykin* does not apply to stipulations, in state court, which affect only punishment (e.g., prior felony convictions, use of a firearm, possession of a dangerous weapon, infliction of great bodily injury in a robbery or burglary—

California Penal Code sections 644, 12022.5, 12022, 213, 461). In each of these situations, there remains considerable room for the operation of constitutional protections for the contested elements of the substantive offense.

We do not purport to suggest that an admission of a prior felony conviction is devoid of federal constitutional significance. However, *Boykin* is limited to guilty pleas and did not consider the need for protective admonitions in recidivist proceedings. The distinctions between pleas of guilty and admissions of prior felony convictions are given prominence here to demonstrate that *Wright's* extension of *Boykin* is far from automatic. The "functional equivalent" reasoning of *Wright* is, we suggest, oversimplified, erroneously based on the assumption that Rule 11 applies to the states,[1] and in contravention of state exposition of state criminal procedure.[2]

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[1]Additionally, we note that the conclusion in *Wright v. Craven*, 325 F.Supp. 1253, 1257 (1971), aff'd in *Wright v. Craven*, 461 F.2d 1109 (9th Cir. 1972) relied at least in part on its holding that "failure by a trial judge, federal or state, to follow the litany prescribed by Rule 11 of the Federal Rules of Criminal Procedure is now seen to be an omission of constitutional proportions." Now the Ninth Circuit has retreated from this supportive holding and determined that Rule 11 is not binding on the states and that *Boykin*, though demanding express support from the record, does not require precise and formal articulation in a state proceeding. *Wilkins v. Erickson*, 505 F.2d 761, 765 (1974). Accord, *Scranton v. Wheaton*, 514 F.2d 99 (6th Cir. 1975) and cases cited therein. See also *United States v. Terrack*, 515 F.2d 588 (9th Cir. 1975) rejecting application of Rule 11 to stipulations of fact in federal cases.

[2]We note that even prior to the decision in *Wright*, *In re Franco*, 4 Cal.App.3d 535, 540-541 (1970) and *People v. Wilson*, 20 Cal.App.3d 507, 511 (1971) specifically rejected application of *Boykin* to California's procedure for accepting admissions of prior felony convictions.

California law on this point has been well summarized in *In re Griffin*, 39 Cal.App.3d 279, 282-283 (1974) *hrg den* 6/19/74 as follows:

> "Under settled California law, the charge of a prior offense is material only to punishment and is not an element of the substantive offense charged in the accusatory pleading. [Citations] Existence of a prior conviction is a fact to be determined solely as one issue in a trial of the current offense. [Citations] The admission of a prior conviction . . . is not the 'functional equivalent' of a plea of guilty to a substantive offense; rather, it is simply a concession or stipulation of an allegation of fact which the prosecution would otherwise have to prove as it does other facts in issue . . . Courts should not let metaphorical phrases (e.g. the 'functional equivalent' phrase) lead them into postulating the *Boykin-Tahl* admonition as an indispensable precondition to a stipulation of fact in a criminal case.' In any event, the *Yurko* decision of the California Supreme Court manifests a refusal to identify an admission of prior convictions as the equivalent of a plea of guilty for the purpose of invoking the *Boykin-Tahl* rule prior to March 7, 1974."

We submit therefore that neither *Boykin* nor any other interpretation of Due Process by this Court requires the procedures mandated in *Wright*. Consequently, *Wright* constitutes a novel and independent declaration of due process by the Ninth Circuit.

B. Intermediate Federal Courts may not impose on state criminal procedure requirements of due process which are more stringent than those which this Court has declared to be binding on the states through the Fourteenth Amendment.

The wisdom of requiring protective admonitions for the receipt of an admission of a prior felony conviction is not at issue in this case. Left to its own devices, California adopted procedures in *Yurko, supra* which are more stringent than the procedures required by *Wright.*[3] The authority of the Ninth Circuit to determine judicial procedure for federal prosecutions within its circuit also is not at issue here. What is at issue is the authority of an intermediate federal court to declare, without Supreme Court precedent (see section A, *supra),* that California's pre-*Yurko* procedure was in violation of the Fourteenth Amendment and that California was bound to conform to a regional federal rule.

The pivotal sentence in the Opinion in this case appears to be:

> "California's failure to be persuaded by *Wright v. Craven* [461 Fed.2d 1109 (9th Cir., 1972)] does not discharge Federal District Courts from their responsibility to determine and apply federal constitutional law in proceedings properly before them under the federal habeas corpus statute." *Id.* at p. v.

To the extent that this "determination" of federal law involves anything more extensive than the use of

[3]See *In re Tahl,* 1 Cal.3d 122 (1970) which goes beyond the holding of *Boykin* that a waiver may not be presumed from a silent record and affirmatively requires that specific and express enumeration and waiver of rights appear on the record.

the court's interpretive process to give effect to laws and directly applicable legal expressions of the United States Supreme Court, we respectfully disagree. In this case, the Ninth Circuit has asserted the power to impose "protective measures" on California procedure because of similarities which that court discerns between pleas of guilty and admissions of prior convictions with respect to waiver of constitutional rights. *Bernath v. Craven,* 506 Fed.2d 1244, 1245 (1974); Opinion App. A at pages iii-iv. This assertion presents the problem of the apportionment of power under our federal system between the United States Supreme Court on one hand and the lower and intermediate federal courts on the other as to which has the authority to declare novel rights of due process binding on the states. We submit that it is the United States Supreme Court and only that court which may raise or lower national standards of fundamental due process. We fear that the Ninth Circuit's opinion in the instant case transforms the role of lower and intermediate federal courts in the habeas corpus context from the "organ of the higher law" *(Brown v. Allen,* 344 U. S. 443, 510 [1953] Frankfurter, J., concurring) to the creator of higher law.

This case presents a fundamental issue of federalism. The crucial determination is of the breadth of that body of law which lower and intermediate federal courts may bring to bear in determining a state prisoner's federal constitutional claims upon petition for writ of habeas corpus. We submit that it is only where there is ". . . disregard of settled indisputable

law" *(Cf. Wood v. Strickland,* 420 U. S. 321 [1974]) as stated by this Court that the lower or intermediate federal courts may grant habeas corpus relief.

Several United States Supreme Court cases have touched upon the issue presented. In *Spencer v. Texas,* 385 U. S. 554, 568-569 (1967), a case challenging the Texas recidivist laws, this Court held:

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of states to promulgate their own rules of evidence and try their own state created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these [the Texas] rules are not."

In 1973, this Court twice reversed grants of habeas corpus by the Ninth Circuit. In both cases, the state procedures were contrary to constitutional standards as declared by the Ninth Circuit; nonetheless, they comported with the minimum standards of due process as expressed by this Court and therefore were upheld. *Schneckloth v. Bustamonte,* 412 U. S. 218 (1973); *Cupp v. Naughten,* 414 U. S. 141 (1973). In *Naughten* a given instruction had been found by the Court of Appeals for the Ninth Circuit to be "so repugnant to the American concept that it is offensive to any fair notion of due process of law." 476 Fed.2d 845, 847. The U. S. Supreme Court reversed, commenting:

> "Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates,

> but it may likewise require it to follow procedure deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution. Thus even substantial unanimity among federal courts of appeals that the instruction in question ought not to be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id.,* 414 U. S. at 146.[4]

Naughten clearly reaffirms the integrity of state court proceedings, even where unwise decisions are made. Furthermore, it demonstrates the specific and significant burden of establishing a violation of the Fourteenth Amendment, a burden not met in the instant situation. Where states impose standards of criminal procedure higher than those required by this Court, they may not do so as a matter of Federal Due Process but only upon independent state grounds. *Oregon v. Haas,* 420 U. S. 714 (1975). Similarly, we submit that requirements by intermediate federal courts of standards of criminal procedure

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[4]For an analogous expression within the context of 42 U.S.C. 1983, see *Wood v. Strickland,* 420 U. S. 308, 326 (1974).

higher than those demanded by this Court (e.g. *Wright v. Craven)* likewise constitute supervisory expressions applicable only within the appellate jurisdiction of the court which issued it. From such supervisory experience within the 50 state and 11 federal "judicial laboratories," this Court may best determine appropriate developments of the national minimum standard of Federal Due Process binding upon all courts.

As the instant case demonstrates, the foregoing authority has not eliminated this unnecessary conflict between the federal and the state courts. We view the Opinion of the Ninth Circuit [App. A] to embody basic misunderstandings of the appropriate federal-state relationships in the habeas corpus context. We seek a declaration by this Court similar to that of the Seventh Circuit in *United States ex rel. Lawrence v. Woods,* 432 Fed.2d 1072, 1075-1076 (7th Cir. 1970), U. S. cert. den. *sub nom. Lawrence v. Woods,* 402 U. S. 983, quoting, in part, from *Iowa National Bank v. Stewart,* 214 Iowa 1229, 232 N.W. 445, 454 (1930):

> "'The federal Circuit Courts of Appeals and, in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, coordinate courts. Finality of determination in respect to the laws of the United States rests in the Supreme Court of the United States. Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the

> decisions of the federal Circuit Courts of Appeals and District Courts.' . . . .
>
> "The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."[5]

C. Application of Wright v. Craven to the instant case was an inappropriate exercise of the Ninth Circuit's power of habeas corpus.

We further request this Court to declare that habeas corpus relief on a case by case basis is inappropriate where this Court has not spoken to an issue and states choose to follow their own procedures. Such a declaration is necessary if the states, although free in theory, are not to be bound in fact by supervisory expressions of intermediate Federal courts. The right of a state to initiate, develop, evaluate, and alter its own state criminal procedures would be an empty right if defendants could "walk across the street to federal court" and undo the state's determination. The integrity of the state judicial process will be seriously undermined if District and Circuit Courts are permitted to use the habeas corpus power to ere-

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[5]In attempting to distinguish *Lawrence,* the opinion of the Ninth Circuit in the instant case notes that *Lawrence* involved the doctrine of "law of the case." *Lawrence* does comment on the doctrine of "law of the case" but states, "that is not the situation here." *Id.* at 1076. We submit therefore that *Lawrence* is directly on point yet in conflict with the opinion in the present case.

ate rules of federal criminal procedure which are as binding upon the states in their effect as rules declared by this Court. In developing state criminal procedure, many states have declared or follow rules similar to *Lawrence, supra.*[6] If the opinion in the present case is allowed to stand, these declarations of state automony and state procedures based upon them will be subject to challenge. Circuit and District Courts will be able to employ a "parity of reasoning" analysis to overturn state court convictions which fully comply with every expression of this Court.

Federal habeas corpus functions in service of the Supremacy Clause, Article 6, Clause 2, of the United States Constitution. *Brown v. Allen, supra,* 344 U. S. at 510, Frankfurter, J., concurring. So designed, it serves to insure state compliance with that uniform national standard of due process to which, at the minimum, each citizen is entitled. Correlatively, *Burge v.*

[6]Calif.—*People v. Bradley,* 1 Cal.3d 80, 86 (1969); D.C.—*M.A.P. v. Ryan,* D.C. 285 A. 2d 310, 312 (1971); Iowa—*Iowa National Bank, supra;* Illinois—*People v. Battiste,* 272 N.E. 2d 808, 811-812 (1971); Kentucky—*Perkins v. Commonwealth,* 516 S.W. 2d 873 (1974); Massachusetts—*Fiorentino v. Probate Court,* 310 N.E. 2d 112, 114 (1974); Maryland—*Greene v. State,* 273 A. 2d 830 (1971); Missouri—*Kraus v. Board of Education of Jennings,* 492 S.W. 2d 783 (1973); New Jersey—*Avant v. Clifford,* 341 A. 2d 629, 652 n.29 (1975); New Mexico—*State ex rel. Apodaca v. Fiorina,* 495 P.2d 1379 (1972); New York—*Greenwald v. Frank,* 363 N.Y.S. 2d 955 (1975); North Carolina—*State v. McCluney,* 180 S.E. 2d 419 (1971); North Dakota—*Robertson Lumber Company v. Progressive Contractors Inc.,* 160 N.W. 2d 61, 69 (1972); Tennessee—*Brown v. State,* 466 S.W. 2d 527, 528 (1971); Texas—*Pruett v. State,* 463 S.W. 2d 191, 194 (1971). See also 147 A.L.R. 857, 858-861 and Tullis and Ludlow, "Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule," 10 *U. S. F. L. Rev.* 67, 77-78 n.40 (1975).

Estelle, 496 F.2d 1177, 1178 (5th Cir. 1974) has defined due process applicable in a habeas corpus proceeding as "the outer limits of permissible conduct as measured by the Federal Constitution." The nationwide uniformity of this boundary between individual rights and permissible state action is important for it reaffirms the primacy of the U. S. Constitution as the unifying national force and as the guarantor of rights which might not otherwise be respected by individual states or regions of the country at a given time.[7]

The evolution of the scope of habeas corpus from an inquiry into jurisdiction of the state courts (*Andrews v. Schwartz,* 156 U. S. 272 (1895)) to an insurer of adequate opportunity to present federal constitutional claims in state courts (*Frank v. Magnum,* 237 U. S. 309 (1915)) and finally to the redetermination in federal court of state court rulings regarding federal constitutional error (*Brown v. Allen,* 344 U. S. 443 (1963)) has been meticulously detailed in *Fay v. Noia,* 372 U. S. 391, 449 (1963) (Harlan, J., dissenting). This court's statements in *Fay* that "vindication of due process is precisely [the writ's] historic office" (*Id.* at 402) and that the congressional purpose in passing the habeas corpus act of 1867 (14 Stat. 385) was to "extend the habeas corpus powers of the federal courts to their constitutional maximum"

[7]In *Burge, supra,* the Fifth Circuit recognized this point and declined to afford relief on petition for writ of habeas corpus because "it would be a disservice to add to it [the federal law of search and seizure] a concept that, even in the limited area of law represented by this case, creates a non-uniform federal standard." *Id.* at 1179.

(Id. at 426) has received penetrating and revealing criticism in the intervening years. See *Schneckloth v. Bustamonte,* 412 U. S. 218, 250-56 (1973) (Powell, J., concurring); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev., 441, 463-507 (1963); Mayers, "The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian," 33 U. Ch. L. Rev. 31, 33-58 (1965); Oaks, "Legal History in the High Court—Habeas Corpus," 64 Mich. L. Rev. 451, 458-68 ((1966). We need not pause to argue whether the recent decision in *Francis v. Henderson,* ..... U.S. ....., 44 U. S. L. W. 4620 (May 3, 1976) is a retreat from the principles of *Fay v. Noia* (Brennan, J., dissenting) or is a modern expression of the principles of comity which always must bear upon federal-state relationships. Nor need we argue whether the instant case is beyond the power of a lower or intermediate federal court on habeas corpus when considering a state decision or whether principles of comity prevent the federal exercise of existing power in this particular case. We do submit, as before, that *Fay v. Noia,* even generously interpreted, does not make appropriate the exercise of the habeas corpus power by lower and intermediate federal courts on an issue where the United States Supreme Court has not yet chosen to act. Particularly in the present case where the "right" declared by the Ninth Circuit is prophylactic rather than to "redress injustice" (*Bustamonte, supra* at p. 265, Powell, J., concurring), "considerations of comity and concern for the orderly administration of justice" (*Francis, supra* at 4621) militate against the exercise of the

habeas corpus power.[8] Thus, we submit that even were this Court now to decide that the protective admonitions required by the Ninth Circuit merit national application, the Ninth Circuit's premature imposition of this requirement on California criminal procedure by writ of habeas corpus would not be an "appropriate exercise of that power." *Id.* at p. 4621.

The misapplication of habeas corpus embodied in the Opinion of the Ninth Circuit denies state criminal proceedings the finality necessary for the effective administration of criminal justice. In all but extraordinary cases, criminal cases should terminate within the progression from the Superior to Appellate to State Supreme Courts. Where the state courts act in full compliance with all expressions of due process as declared by the U. S. Supreme Court, and where the defendant believes a new or greatly expanded rule of Federal Due Process should apply, it should be that defendant's burden to carry his cause to this Court by petition for certiorari following a denial of habeas corpus relief by the lower and intermediate federal courts.

Wright v. Craven constitutes, at most, a regional and not a national expression of due process. If the Opinion of the Ninth Circuit in the present case remains unaltered, it will encourage disparate notions and fractured applications of the due process standard. Rather than allowing the standard to vary from

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[8]Respondent does not contend that his admission of prior felony convictions was without aid of counsel or involuntary, only that the record does not indicate provision of the *Boykin* litany. See also App. B at pp. ix-x.

state to state as it did prior to Reconstruction, the Opinion of the Ninth Circuit would have it vary from region to region. We submit that neither approach is acceptable, that notions of due process may be declared and expanded only by this Court, for only this Court has appellate jurisdiction of a national scope. Consequently, with support from *Bustamonte, Naughten, Spencer, Francis,* and *Lawrence, supra,* we submit that the Ninth Circuit's grant of relief in the present case was not an appropriate exercise of its habeas corpus power and must be reversed.

CONCLUSION

We respectfully request this Court to grant a writ of certiorari and reverse the decision of the Court of Appeals.

Dated: May 25, 1976.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
W. ERIC COLLINS,
Deputy Attorney General,
JAMES D. HURWITZ,
Deputy Attorney General,
Attorneys for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-3424

John Julius Sesser,	Plaintiff-Appellant,
vs.	
J. B. Gunn,	Defendant-Appellee.

[Filed Jan. 28, 1975]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BROWNING and SNEED, Circuit Judges,
*JAMESON, District Judge

PER CURIAM:

Appellant, a state prisoner, appeals from an order of the district court denying his petition for habeas corpus. We reverse.

On February 1, 1973, appellant was charged with two counts of robbery in an information filed in the Superior Court of Alameda County, California. The information also alleged that appellant had been con-

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

victed of three prior felonies. The purpose of the latter allegation was to bring into play California Penal Code § 644, which provides that a person convicted of a felony who has been convicted of three prior felonies shall be adjudged a habitual criminal and imprisoned for life.

Initially, appellant pleaded not guilty to the robbery charges and stood mute as to the charge of prior felony convictions. He was rearraigned on April 2, 1973, and admitted the prior convictions. Subsequently, he was sentenced to state prison as a habitual criminal on the basis of a jury verdict of guilty on the robbery charges and his admission of the prior convictions.

After exhausting state remedies, appellant filed his petition for a writ of habeas corpus in the district court, claiming that his adjudication and sentence as a habitual criminal were constitutionally defective because he had not been admonished on the record of the consequences of his admission of the prior felony convictions.

On June 19, 1972, we held in *Wright v. Craven,* 461 F.2d 1109 (9th Cir. 1972), that an admission of prior convictions alleged to obtain an adjudication and sentencing under California Penal Code § 644 was the "functional equivalent" of a plea of guilty to a separate charge, and that under the principles announced in *Boykin v. Alabama,* 395 U.S. 238 (1969), such an admission may not be accepted unless the record reflects that it was made with a full understanding of its consequences. In *Bernath v. Craven,* 506 F.2d 1244 (9th Cir. 1974), we held that the decision in *Wright v. Craven* was to be applied prospectively only; that is, only to admissions of prior felony convictions that were made after the date *Wright v. Craven* was filed. Appellant's admission, as we have said, was made April 2, 1973, nine months after *Wright v. Craven.*

Almost a year after appellant's admissions, on March 7, 1974, the Supreme Court of California in *In re Yurko,* 10 Cal.3d 857 (1974), adopted the rule this court had announced in *Wright v. Craven.* The California Supreme Court further held that its decision was to be applied only to admissions received after the date of the filing of *In re Yurko.*

In rejecting appellant's petition for habeas corpus in this case, the district court reasoned that *Wright v. Craven* rested upon the premise that an admission of prior convictions was the equivalent of a guilty plea; that the existence of this equivalence was a question of state law; that the Supreme Court of California is "clearly the final expositor of state law"; and that the Supreme Court of California "found that equation to exist after March 7, 1974." Because appellant's admission was received prior to March 7, 1974, the district court concluded that it was not equivalent to a guilty plea under state law, and, therefore, that appellant need not have been informed on the record of the consequences of his admission.

The equivalence referred to in *Wright v. Craven* was explained in *Bernath v. Craven:*

> Like the entering of a guilty plea, an admission to a prior offense is also a waiver of fundamental

> constitutional rights, privileges and immunities. Because of this similarity between a guilty plea and an admission to a prior offense with regard to the waiving of constitutional rights, this court has termed the admission to a prior offense as the *functional equivalent* of a guilty plea and has imposed protective measures on the [acceptance of an admission similar to] those imposed on the acceptance of a guilty plea.

506 F.2d at 1245.

Thus, the decision in *Wright v. Craven* does not rest upon the characterization the state attaches to an admission of prior felonies; it rests rather upon the consequences such an admission has under state law. The Attorney General of California recognizes that an admission of prior felony convictions has the consequences attributed to it in *Wright v. Craven;* the Supreme Court of California recognized the accuracy of this description in *In re Yurko.* The rule that follows under the United States Constitution because of these consequences is a rule of federal law.

The Attorney General of California argues, however, that California courts are not required to accept the decision in *Wright v. Craven.* The Attorney General points out that California courts have long held that "although we are bound by the decisions of the United States Supreme Court interpreting the federal constitution, we are not bound by the decisions of the lower federal courts even on federal questions." *People v. Bradley,* 1 Cal.3d 80, 86 (1969) (citations omitted). The Attorney General argues that to grant appellant's petition would force Ninth Circuit decisional

law upon a tribunal not subject to its appellate jurisdiction and thereby violate principles underlying our federalism.

The jurisdiction of federal district courts to issue writs of habeas corpus on petition of state prisoners is original, not appellate *(Fay v. Noia,* 372 U.S. 391, 407, 409 (1963)), though our jurisdiction over the decisions of the district courts in such cases is appellate. 28 U.S.C. § 2253. California's failure to be persuaded by *Wright v. Craven* does not discharge federal district courts from their responsibility to determine and apply federal constitutional law in proceedings properly before them under the federal habeas corpus statute. *Townsend v. Sain,* 372 U.S. 293, 318 (1963); *Brown v. Allen,* 344 U.S. 443, 459 (1953); *id.* at 506-08 (Frankfurter, J., concurring). Nor does it discharge us from our duty to determine and apply federal law in the exercise of our appellate jurisdiction over federal district courts.

As Justice Frankfurter said in his concurring opinion in *Brown v. Allen, supra,* 344 U.S. at 510:

> Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law

rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), relied upon by the Attorney General of California, is not in point. The court there decided that a state court need not follow an inferior federal court decision on a question of federal constitutional law in a subsequent case arising in the state court. Distinguishing the question before us, the court said, "Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the cases and its judgment is binding on all other courts, subject only to the appellate process." *Id.* at 1076.

The state urges us, in the interest of comity, to conform the effective date of the rule announced in *Wright v. Craven* to that fixed by the Supreme Court of California for the rule announced in *In re Yurko.* While under certain circumstances such deference might well be appropriate, federal courts have no discretion to decline to apply a federal constitutional rule to a case such as this in which the operative facts occurred after the rule was announced.

Reversed and remanded.

Appendix B

United States District Court
for the
Northern District of California

Civil Action File No. C74-1545 GBH

John Julius Sesser,

vs.

J. B. Gunn,

[Filed Oct. 17, 1974]

JUDGMENT

This action came on for hearing before the Court, Honorable GEORGE B. HARRIS, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the petition should be, and the same is, hereby denied; the order to show cause is discharged; and the action is hereby dismissed.

Dated at San Francisco, California, this 17th day of October, 1974.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

F. R. PETTIGREW
Clerk, U. S. District Court
Northern District of California

By Peter C. Grace
Deputy Clerk

United States District Court
Northern District of California

Civil No. 74-1545 GBH

John Julius Sesser, Petitioner,

vs.

J. B. Gunn, Respondent.

[Filed Oct. 17, 1974]

ORDER

This is a petition for a writ of habeas corpus by John Julius Sesser challenging the validity of a judgment and commitment of the Superior Court of the State of California for the County of Alameda for violation of California Penal Code section 211 (robbery of the second degree) and an adjudication that petitioner is a habitual criminal as defined by subdivision (a) of California Penal Code section 644.

This action is before the court on the petition; respondent's return; and petitioner's traverse.

Preliminarily petitioner complains that the police acted illegally when they arrested him without a warrant and seized certain evidence without a search warrant. The superior court, after hearing conflicting evidence, denied petitioner's pretrial motion to suppress this evidence. The Court of Appeal of the State of California, First Appellate District, Division Four,

found that the search and seizure was lawful and affirmed the conviction. Petitioner does not show nor does this Court find from an examination of the transcript of the hearing in the superior court that the determination of the state trial and appellate courts were not fairly supported by the record. Accordingly, this court accepts those factual determinations (28 U.S.C. section 2254[d]) and agrees with the opinion of the Court of Appeal that petitioner's initial contention is without merit.

In his main contention petitioner complains that he was adjudged a habitual criminal based on his admission of the three charged prior felony convictions without an admonishment on the record as to the consequences of such admission. There is no indication that the state trial court advised petitioner of the possible consequences of his admission of the prior offenses. On March 7, the California Supreme Court in *In re Yurko*, 10 Cal.3d 857; 112 Cal.Rptr. 513, 519; P.2d 561 (1974), declared as a new rule of state criminal procedure that an accused must be advised of the consequences prior to the admission of prior convictions. The court further declared that after careful consideration of the factors expressed in *Halliday v. United States*, 394 U.S. 831 (1969), that this new rule be applied prospectively from the date of its decision. Since petitioner made his admission prior to March 7, 1974, the California Court of Appeal rejected this contention.

Petitioner does not allege that the prior convictions he admitted suffering were illegal. Rather, having enjoyed the immediate tactical benefits of admitting the

prior conviction, e.g., keeping their existence from the jury (see *Womick v. Craven,* 431 F.2d 1191 [9th Cir. 1970]), petitioner now seeks to avoid the unfavorable consequences by reference to *Wright v. Craven,* 461 F.2d 1109 (9th Cir. 1972) and *Cancino v. Craven,* 467 F.2d 1243 (9th Cir. 1972).

The need to admonish an accused of the consequences of admitting charged prior convictions depends on equating such an admission with a plea of guilty to a charged crime. The 9th Circuit found such an equation to exist under California law. *Wright v. Craven, supra.* Subsequently the California Supreme Court in *In re Yurko, supra,* found that equation to exist after March 7, 1974. *In re Griffin,* 39 Cal. App. 3d 279, 283; 114 Cal.Rptr. 74, 76 (1974). State courts are clearly the final expositor of state law. *Brady v. Maryland,* 373 U.S. 83, 90 (1963).

Since petitioner's admission occurred when there was no equation of admissions of prior convictions with a plea of guilty, he need not have been admonished of the consequences and this contention must fail. This ruling brings federal and state law into coincidence and removes the possible conflict of state courts applying its laws prospectively and federal court applying the same state principal retroactively.

Accordingly, it is the order of this Court that the petition should be, and the same is, hereby denied; the order to show cause is discharged; and the action is hereby dismissed.

Dated: October 17, 1974.

George B. Harris
United States District Judge